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{SHOW } PROCEEDINGS AND ORDERS DATE: 051785

CASE NBR 84-1-01165 CFY
SHORT TITLE United States DOCKETED: Jan 17 1985
VERSUS Benchimol, Joseph

Date	Proceedings and Orders
Jan 2 1985	Application for extension of time to file petition and order granting same until January 17, 1985 (Rehnquist, January 4, 1985).
Jan 17 1985	Petition for writ of certiorari filed.
Feb 19 1985	Order extending time to file response to petition until March 15, 1985.
Mar 19 1985	Order further extending time to file response to petition until March 25, 1985.
Mar 22 1985	Brief of respondent Joseph Benchimol in opposition filed.
Mar 27 1985	DISTRIBUTED. April 12, 1985
Apr 5 1985	Reply brief of petitioner United States filed.
Apr 17 1985	Record requested 4/18/85 (WJB).
Apr 26 1985	Record filed.
Apr 26 1985	Certified original record & C.A. proceedings, 5 volumes, received.

CONTINUE {

PROCEEDINGS AND ORDERS DATE: 051785

CASE NBR 84-1-01165 CFY
SHORT TITLE United States DOCKETED: Jan 17 1985
VERSUS Benchimol, Joseph

Date	Proceedings and Orders
May 3 1985	REDISTRIBUTED. May 9, 1985
May 13 1985	Petition GRANTED. Judgment REVERSED. Opinion concurring in the judgment by Justice Stevens. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. Opinion per curiam.

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BENCHIMOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, when the attorney for the government and counsel for the defendant enter into a plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(B) under which the government agrees to recommend a particular sentence, an additional term constructively to be implied in any such agreement is that the attorney for the government will explain to the court the government's justification or reasons for the recommendation.

2. Whether the failure by the attorney for the government to offer such an explanation in this case is a basis for a collateral attack on the conviction and sentence under Fed. R. Crim. P. 32(d) or 28 U.S.C. 2255 five years after the guilty plea was entered, even though the district court clearly understood the substance of the government's recommendation and respondent made no objection to the government's performance under the plea agreement at the time of sentencing or by taking a direct appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BENCHIMOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 738 F.2d at 1001. The portions of the transcript of the hearing in district court at which the court stated its reasons for denying relief (App., *infra*, 11a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered (although not issued separately from the opinion) on July 24, 1984, and the government's timely petition for rehearing was denied on November 9, 1984 (App., *infra*, 10a). By order dated January 4, 1985,

Justice Rehnquist extended the time within which to file the petition for a writ of certiorari to and including January 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

1. Rule 11(e) of the Federal Rules of Criminal Procedure provides in pertinent part:

> *Plea Agreement Procedure.*
>
> (1) *In General.* The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.
>
> The court shall not participate in any such discussions.
>
> (2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.
>
> (3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.
>
> (4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

* * * * *

2. Rule 32(d) of the Federal Rules of Criminal Procedure, as in effect prior to August 1, 1983, provided:

> *Withdrawal of Plea of Guilty.* A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

3. Rule 32(d) of the Federal Rules of Criminal Procedure, as amended effective August 1, 1983, provides:

> *Plea Withdrawal.* If a motion for withdrawal of a plea of guilty or nolo contendere is made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205(c), the court may permit withdrawal of the plea upon a showing by the defendant of any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

STATEMENT

1. On April 30, 1976, respondent pleaded guilty to an information charging him with one count of mail fraud, in violation of 18 U.S.C. 1341, in connection with the mailing of an application for a credit card using a fictitious name. Respondent's plea was pursuant to an agreement under which the government would recommend that he be placed on probation on the condition that he make restitution (App., *infra*, 2a). In taking the plea, the district court stated that "[t]he government is [sic] advised that they recommend you be placed on probation on the condition that restitution be made, and I'll consider that recommendation," but the court informed respondent that it was not bound by the government's recommendation. Respondent stated that he understood. 4/30/76 Tr. 5-6.

The Assistant United States Attorney thereafter informed the probation officer in writing that the government had agreed to recommend probation (E.R. 23, 25),[1] but the presentence report incorrectly

[1] "E.R. refers to the Excerpts of Clerk's Record filed in the court of appeals.

stated that the government would stand silent with regard to sentencing (E.R. 23). Defense counsel brought this error to the court's attention at the sentencing hearing, characterizing it as a "slight correction" in the presentence report (5/21/76 Tr. 4). The attorney for the government confirmed defense counsel's description of the government's actual recommendation by stating: "That is an accurate representation" (*ibid.*). Defense counsel acknowledged, however, that the court was "probably more inclined toward a youth commitment than probation" (*id.* at 4-5), and the court in fact did sentence respondent to the custody of the Attorney General for six years for treatment and supervision under the Youth Corrections Act, 18 U.S.C. 5010(b) (5/21/76 Tr. 5-6). Neither respondent nor his attorney suggested at the sentencing hearing that the government had breached the plea agreement, and no direct appeal was taken from the judgment of conviction and sentence.

2. Respondent was released on parole after serving 18 months of his sentence (12/15/81 Tr. 10). On October 16, 1981, after respondent had remained at large for several years following the issuance of a parole violator warrant for his arrest,[2] respondent

[2] The transcript of the hearing in district court on respondent's motion for collateral relief indicates that the parole violator warrant was based on petitioner's failure to report a change of address and that he had left the country for an extended period (12/15/81 Tr. 10-11).

We have been informed by the Parole Commission that the parole violator warrant was issued on March 13, 1978, and that respondent was taken into custody on that warrant on October 19, 1981. He was then released on bail following a hearing before the magistrate, pending the outcome of the instant proceedings. The Parole Commission therefore retains the right to take respondent into custody.

filed a motion under Fed.R.Crim.P. 32(d) and 28 U.S.C. 2255 to withdraw his guilty plea or, in the alternative, to have his sentence vacated and be resentenced to time served. In seeking this relief, respondent contended that the government breached the plea agreement by standing silent instead of recommending probation (E.R. 9, 11, 14).[3]

The district court held a hearing on the motion and found that the plea agreement was correctly stated at the time the plea was taken and that respondent's attorney corrected the error in the presentence report at the time of sentencing (App., *infra*, 11a). The district court further found (*id.* at 12a):

> It was perfectly apparent to everybody present that the government was recommending probation and that I took that into account, as I said that I would, at the time of the entry of sentence. But it was everyone's understanding, including the expressed understanding by [respondent,] that I wasn't to be bound by that.

Finding no impropriety in the prior proceedings, the district court denied respondent's motion to withdraw his plea or for other collateral relief (App., *infra*, 12a, 15a).[4]

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[3] Respondent also contended (E.R. 11-12) that he was entitled to relief under 28 U.S.C. 2255 because his right to appeal had been "frustrated" by the court's statement at the guilty plea hearing that if he went to trial he could appeal if he were found guilty, but that he would waive that and other rights by pleading guilty. See 4/30/76 Tr. 5.

[4] The district court in the instant proceedings found that there had been an error in the reporter's transcript of the sentencing hearing. At the point at which respondent's attorney corrected the error in the presentence report, the transcript quotes counsel as stating: "The government recommended there be probation with restitution in this case. Rather they would stand silent, and I believe that's what the report reflects" (5/21/76 Tr. 4). The transcript then shows the attorney for the government stating: "That is an accurate representation" (*ibid.*).

The district court found at the hearing on respondent's motion that, with respect to defense counsel's statement, "[t]he actual language was that the government recommended that there be probation with restitution in this case *rather than* that they would stand silent" (App., *infra*, 11a-12a (emphasis added)). It was then that the district court stated, in the passage quoted in the text, that "[i]t was perfectly apparent to everybody present that the government was recommending probation" (*ibid.*). The district court reiterated the same point later in its opinion (*id.* at 13a):

> I have an independent recollection of this in a very vague way even though it was this far back. I do remember the occasion, and on reviewing the presentence report I remembered the circumstances, and there was no doubt in my mind at that time that everyone was in perfect understanding of what the position of the United States was and of the fact that I was disregarding it in that case.

3. a. A divided court of appeals reversed and remanded for resentencing (App., *infra*, 1a-9a). The court held, sua sponte, that "when the government undertakes to recommend a sentence pursuant to a plea bargain, it has a duty not only to state its recommendation clearly to the sentencing judge," but also "to express the justification for it" (*id.* at 3a-4a).[5] In this case, the court of appeals concluded that the prosecutor's statement at sentencing, which agreed

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[5] In his brief in the court of appeals, respondent did not argue that he had bargained for or was entitled to a statement by the prosecutor of the government's justification for its recommendation. He simply renewed his claim that the government had stood silent and thus had made no recommendation at all. See Appellant's Br. 5-8.

with defense counsel's correction of the presentence report without an explanation of the government's reasons for agreeing to recommend a lenient sentence, "left an impression with the [district] court of less-than-enthusiastic support for leniency" (*id.* at 3a). The court of appeals also found the prosecutor's statement "ambiguous" because defense counsel's statement that the government "recommended" probation "could have been interpreted as a statement of the past intent of the government" (*ibid.*).

On this basis, the court of appeals held that the government had breached the plea agreement and that respondent was entitled to relief. The court held that the appropriate relief was to remand for resentencing before a different judge, "at which time the government will comply with its plea bargain by clearly stating its recommendation of probation with restitution and the reasons why it believes that sentence is appropriate" (App., *infra*, 6a).

b. Judge Wallace dissented (App., *infra*, 7a-9a). He acknowledged that "[i]n recommending a sentence as part of a plea bargain, the prosecutor must effectively communicate the government's firm position to the sentencing judge" (*id.* at 7a). But he concluded that "[t]he Assistant United States Attorney did exactly that in [respondent's] case," because the district court found that it had been "perfectly apparent" at sentencing that the government was recommending probation (*ibid.*).

Judge Wallace also faulted the majority for focusing on "the wording and the length, or perhaps the volume of the government's recommendation" (App., *infra*, 7a). In particular, he found "unpersuasive" the majority's reliance on *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977), and *United*

States v. *Brown*, 500 F.2d 375 (4th Cir. 1974), because in those cases "the prosecutor expressed open distaste for the plea bargains" (App., *infra*, 8a), while in this case, the prosecutor agreed with defense counsel's representation of the government's position and "did not undercut or express distaste for the plea bargain" (*ibid.*). Judge Wallace further reasoned that neither the decisions of this Court nor professional standards "impose[] the duty of zeal an advocate owes to his client on the prosecutor fulfilling a [plea] bargain, nor could they. The defendant is not the prosecutor's client" (*ibid.*). Finally, Judge Wallace rejected the majority's holding that the prosecutor is required to state the government's justification for the recommended sentence, even where the court does not request such a statement. Here, Judge Wallace explained, "the district court found such extended inquiry unnecessary"; "[t]he government performed properly"; and "[n]o one was misled" (*id.* at 9a).

REASONS FOR GRANTING THE PETITION

The court of appeals granted relief in this case on the ground that the government had breached its agreement to recommend that respondent be placed on probation. Yet the district court found that it was "perfectly apparent" to everyone present at sentencing that the government in fact *did* recommend probation. The court of appeals apparently adopted a rule which deems it to be constructively implied in every plea agreement under which the government is to recommend a particular sentence that the government also will explain to the sentencing court the justification for its recommendation—even where the defendant did not bargain for such an explanation

and even though it often might prove detrimental to the defendant. This holding finds no support in the Constitution, Rule 11 of the Federal Rules of Criminal Procedure, the logic of the plea bargaining process, or the decisions of this Court and the courts of appeals. It also threatens to open a whole new area of litigation regarding the nature and persuasiveness of the prosecutor's performance that is at best peripheral to the plea agreement and to the validity of the guilty plea and conviction based on that agreement.

In addition, the court of appeals granted relief in this case even though respondent did not suggest at the time of sentencing that the government had breached the plea agreement and did not take a direct appeal for that purpose, but instead waited until five years after he pleaded guilty to collaterally attack his conviction and sentence. In granting relief in these circumstances, the court of appeals wholly ignored the provision of former Fed. R. Crim. P. 32(d) that a court may set aside a conviction and allow the defendant to withdraw his guilty plea only to "correct manifest injustice," and the parallel standards for granting relief under 28 U.S.C. 2255. The court of appeals thus has invited serious inroads into the finality of convictions based on guilty pleas. Review by this Court therefore is warranted.

1. a. The court of appeals held that when the government undertakes to recommend a sentence pursuant to a plea bargain, it has a duty not only to make that recommendation known clearly to the sentencing judge, but also to express the justification for it. In imposing this requirement, the court reached out to decide an issue that was not before it. Respondent did not argue in district court or the court of appeals that the particular plea agreement

involved in this case embodied a requirement that the prosecutor explain the government's justification for the recommended sentence. Indeed, respondent did not even argue that he was entitled to an explanation of the government's recommendation. He contended only that the government had remained silent and not actually made a recommendation at all (E.R. 9, 11, 13-14; Appellant's Br. 5-8).

b. The court of appeals also did not explain the source of the novel rule it announced. It is clear, for example, that the Constitution does not dictate the substance of the undertakings that must be agreed to by the government. The Constitution leaves that matter to be resolved in the bargaining process between the prosecution and defendant. See *Mabry* v. *Johnson*, No. 83-328 (June 11, 1984), slip op. 3-5; *United States* v. *Goodwin*, 457 U.S. 368, 378-380 (1982); *Corbitt* v. *New Jersey*, 439 U.S. 212, 219-223 (1978); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 361-364 (1978); *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977); *Santobello* v. *New York*, 404 U.S. 257, 262 (1971); *Brady* v. *United States*, 397 U.S. 742, 752 (1970).

Nor does Fed. R. Crim. P. 11(e), which addresses the plea bargaining process in federal criminal cases, impose any requirement that the prosecutor state the government's justification for its recommendation. To the contrary, Rule 11(e) expressly affords the prosecution and defense a broad range of options. Rule 11(e)(1) states that the attorney for the government and defense counsel may engage in discussions with a view toward reaching an agreement that, upon the defendant's entering of a plea of guilty or nolo contendere, the attorney for the government will do any of the following:

(A) move for dismissal of other charges;

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the Court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

Rule 11(e)(1)(B) refers only to a "recommendation." It does not suggest that a statement of the government's justification for the recommendation also is a necessary element of such an agreement, just as it does not require as an element of the other form of agreement referred to in Rule 11(e)(1)(B) that the government state its justification for not opposing the defendant's request for a particular sentence. The Ninth Circuit itself previously recognized this principle in *United States* v. *Travis*, 735 F.2d 1129 (1984). There, the government had agreed as part of a plea bargain to recommend only in general terms that a "substantial period of incarceration" be imposed, but otherwise to "stand mute" at sentencing. *Id.* at 1131. Because the government thereafter failed to stand mute at sentencing, the court of appeals vacated the sentence and remanded for resentencing. *Id.* at 1132. Similarly, Rule 11(e)(1)(C) contemplates that the government may "agree" that a specific sentence is an appropriate disposition, but does not suggest that a statement to the court of the government's reasons for so agreeing is a necessary element of the bargain.

Thus, paragraphs (B) and (C) of Rule 11(e)(1) simply identify three types of permissible plea bargains that reflect different postures the government may assume with respect to a proposed sentence.

They do not require that the government communicate its view of or justifications for the bargain to the court.[6] Nor is there any mention of such a requirement in the advisory committee note on the 1974 amendments to Rule 11 in which the plea agreement procedures in Section (e) were adopted. Accordingly, Rule 11, like the Constitution, leaves these and other details of the parties' undertakings to be resolved in negotiations between the parties.

c. We do not suggest, of course, that the prosecution and defense may not negotiate a plea agreement in a particular case in which the prosecutor commits himself to explain to the court the government's reasons or justification for the agreement. But as noted above, respondent did not argue below that the plea agreement in this case embodied such a requirement.[7] Nor does the record suggest that this was an element of the plea agreement. If it had been, Rule 11(e)(2) would have required that this element be disclosed to the district court prior to acceptance of the plea. Similarly, although defense counsel at sentencing called the court's attention to the fact that the government had agreed to recommend probation, counsel did not suggest that the attorney for the government also had undertaken to elaborate upon the government's reasons for making the recommendation and counsel did not object when the attorney

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[6] Compare Fed. R. Crim. P. 11(e)(2) (requiring only that the terms of the agreement be disclosed on the record).

[7] Compare, *e.g.*, *In re Geisser*, 513 F.2d 862, 864, 865 n.5 (1975), after remand, 554 F.2d 698 (1977), after further remand, 627 F.2d 745 (5th Cir. 1980), cert. denied, 450 U.S. 1031 (1981). There, the prosecutor agreed to use his "best efforts" to prevent extradition of the defendant.

for the government thereafter failed to offer such an explanation.

Thus, the court of appeals apparently has held that a statement by the attorney for the government of the government's justification for a recommended sentence must be deemed to be an implied term of every such agreement, whether or not the parties actually bargained for that performance. Obviously, that requirement is not an obligation implied in fact, based on the parties' actual understanding; it is an obligation implied in law. The court of appeals had no authority to impose its own view of appropriate elements of a plea bargain in this manner.

There are, moreover, compelling reasons why it cannot be inferred that the parties to plea bargains necessarily intend that the government will explain to the court its justifications for a particular sentencing recommendation or otherwise elaborate upon or affirmatively advocate in favor of it. A plea agreement is a compromise resulting from negotiations between the prosecution and defense, who proceed from quite different—and often diametrically opposed—perspectives. The defendant's interest presumably is in obtaining the most favorable disposition possible and in achieving some measure of support by the government for that disposition. The government's interest is quite different: "to persuade the defendant to forgo his constitutional right to stand trial." *United States* v. *Goodwin*, 457 U.S. at 378. This interest may stem from perceived weaknesses in the government's case, a desire to devote scarce resources to trials in other cases, a desire to dispose of the case promptly to prevent the defendant from committing other offenses while free pending trial, a reluctance to expose the victim or another witness

to the burden of testifying at trial, the need to protect sensitive information, etc. See, *e.g.*, *Mabry* v. *Johnson*, slip op. 4 n.8, quoting *Brady* v. *United States*, 397 U.S. at 752; *Santobello* v. *New York*, 404 U.S. at 261.

These differing perspectives obviously would color the statement by counsel for each party of his justification for the agreement reached between them. Under Fed. R. Crim. P. 32(a)(1)(B), counsel for the defendant must be afforded "an opportunity to speak on behalf of the defendant" at sentencing. Thus, if defense counsel gives reasons in favor of a particular sentence, that presentation typically would attempt to cast the defendant in a favorable light and to explain why a lenient sentence is appropriate to the defendant's circumstances.

Rule 32(a)(1) also affords the attorney for the government an opportunity to speak to the court at sentencing, but it does not provide that such a presentation must be "on behalf of the defendant." Nor is there any reason to believe that such a presentation would necessarily put the defendant in a favorable light. If the government explained, for example, that it had agreed to recommend a particular sentence only in order to avoid devoting scarce resources to a trial or to avoid calling the victim as a witness (factors that may properly motivate the government to enter into such an agreement), the court would be left with the impression that the government actually believed that a harsher sentence would be appropriate.[8] Accordingly, from the defendant's perspective,

[8] That impression would often be accurate. A plea agreement is, after all, a compromise. If the government agrees to recommend or not to oppose a particular sentence or goes

it may often be advantageous for the government not to offer any justification for a particular recommendation. See *State* v. *Peterson*, 680 P.2d 445, 447 (Wash. App. 1984).

By the same token, the government might agree affirmatively to recommend a particular sentence only with the greatest reluctance. If such a recommendation necessarily carried with it the further requirement to give a justification for the agreement or otherwise assume a duty of advocacy in favor of it, the government might be unwilling to make such a recommendation at all and instead agree, at most, not to oppose the defendant's request for a particular sentence. What is more, if the prosecutor did assume a duty of advocacy, it would not be on behalf of the defendant, but on behalf of his client, the government. See, *e.g.*, *United States* v. *Agurs*, 427 U.S. 97, 110-111 (1976); *Berger* v. *United States*, 295 U.S. 78, 88 (1935). As Judge Wallace stated in his dissenting opinion: "Neither the Supreme Court nor professional standards, *see* Model Code of Professional Responsibility, EC-7-1, imposes the duty of zeal an advocate owes to his client on the prosecutor fulfilling a bargain, nor could they. The defendant is not the prosecutor's client." App., *infra*, 8a. Thus, if the court of appeals' decision is allowed to stand, it will substantially disrupt the plea bargaining process by confusing the role of the prosecutor and imposing a requirement that often might not be in the interest

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further and enters into an agreement that a particular sentence is an appropriate disposition, that may reflect only the fact that the arrangement is the best the government could obtain under the circumstances, not the government's view that it is the most appropriate sentence. See *Bergman* v. *Lefkowitz*, 569 F.2d 705, 714 (2d Cir. 1977).

of the government or the defense and might therefore prevent them from reaching agreement.

d. The court of appeals believed that its holding was supported by *United States* v. *Grandinetti*, 564 F.2d 723 (5th Cir. 1977), and *United States* v. *Brown*, 500 F.2d 375 (4th Cir. 1974). See App., *infra*, 4a-6a. But as Judge Wallace explained, although the opinions in those cases "contain some stray language involving a governmental responsibility to 'strongly advocate' the plea bargain or to express 'some degree of advocacy,'" [9] in both cases "the prosecutors expressed open distaste for the plea bargains" (App., *infra*, 8a). See *United States* v. *Grandinetti*, 564 F.2d at 725; *United States* v. *Brown*, 500 F.2d at 377. Here, by contrast, the substance of the government's recommendation was clearly communicated to the court and the prosecutor did not express disapproval of the agreement.[10]

Other courts have stressed the importance of this distinction. In *United States* v. *Tursi*, 576 F.2d 396 (1st Cir. 1978), the First Circuit rejected the contention that the defendant was entitled to relief under 28 U.S.C. 2255 because the government did not "forcefully advocate the recommended sentence" (576 F.2d at 399). The court there found the defendant's

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[9] See 564 F.2d at 726; 500 F.2d at 377.

[10] Judge Wallace expressed the view that the majority in this case had not actually imposed a duty of advocacy on the prosecutor. See App., *infra*, 8a. We cannot be so sanguine. The majority quoted, with apparent approval, what Judge Wallace referred to as the "stray language" in *Grandinetti* and *Brown* regarding the prosecutor's duty of advocacy. App., *infra*, 4a-5a. Moreover, the majority's requirement that the prosecutor express a justification for the recommendation is itself a form of mandatory advocacy.

reliance on *United States* v. *Brown* misplaced, because in *Brown* the government had " 'effectively undercut' " the plea bargain, while in *Tursi*, "the government did, in fact, recommend the sentence previously agreed upon and issued no equivocal comments regarding it" (576 F.2d at 399, quoting 500 F.2d at 378).

Similarly, in *Bergman* v. *Lefkowitz*, 569 F.2d 705, 714-716 (1977), the Second Circuit, in an opinion by Judge Friendly, rejected the contention that the prosecutor had breached an agreement to recommend a particular sentence by making the recommendation only "grudgingly" and "tepidly." Like the First Circuit in *Tursi*, the Second Circuit rejected the defendant's reliance on *Brown*, describing it as a case in which the prosecutor "effectively undercut" the plea bargain. 569 F.2d at 715. The court further stated that if defense counsel had requested that the prosecutor add words such as "unreservedly," "sincerely," or "unequivocally" to his recommendation, it "[had] no doubt he would have done so, but there was a need for this" (*ibid.*). The court explained (*id.* at 715-716 (footnote omitted)):

> We would not regard a rule permitting a plea bargain to be avoided as a denial of due process because of lack of adequate gusto in a prosecutor's recommendation, particularly when this is discerned by defense counsel only after a disappointing sentence, as promoting the sound administration of criminal justice.

Yet that is exactly the result the court of appeals reached in this case.

Thus, the Ninth Circuit's decision—which requires the government not only to recommend a particular sentence and to take no action to undermine that

recommendation, but also to explain its justification for the recommendation—conflicts with the decisions in *United States* v. *Tursi* and *Bergman* v. *Lefkowitz*, *supra*,[11] and goes well beyond the circumstances of *United States* v. *Grandinetti* and *United States* v. *Brown*, *supra*.[12]

2. a. The court of appeals also ignored applicable standards of review in granting collateral relief for what it found to be a breach of a constructively implied condition that the prosecutor explain the government's ~~jurisdiction~~ for its recommendation. Respondent sought relief under Fed. R. Crim. P. 32(d) and 28 U.S.C. 2255, both of which are " 'procedures for collateral attack of a federal plea conviction' "

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[11] Compare also *State* v. *Peterson*, 97 Wash. 2d 864, 871, 651 P.2d 211, 214-215 (1982) (relief granted where trial court refused *defendant's* request to allow prosecutor to explain reasons for lenient sentence), with *State* v. *James*, 35 Wash. App. 351, 355-357, 666 P.2d 943, 946 (1983) (prosecutor need not elaborate upon recommendation in absence of request), and *State* v. *Peterson*, 680 P.2d 445, 447 (Wash. App. 1984) (relief denied where prosecutor, upon defendant's request, gave justification for recommendation that was not fully favorable to the defendant).

[12] See *United States* v. *Blackwell*, 694 F.2d 1325, 1337-1338 n.15 (D.C. Cir. 1982) (characterizing *Grandinetti* as a case in which "prosecutor violated agreement by expressing reservations about agreed-upon sentence in plea bargain"); *United States ex rel Robinson* v. *Israel*, 581 F.2d 1276, 1280 (7th Cir. 1978) (citing *Brown* for proposition that "prosecutor has an obligation not to undermine a plea he bargained"). Accord, *State* v. *Witte*, 308 Minn. 214, 216, 245 N.W.2d 438, 439 (1976); *People* v. *Jones*, 88 Ill. App. 3d 737, 740-741, 410 N.E.2d 1106, 1109 (1980); *State* v. *Davis*, 123 Ariz. 564, 567, 601 P.2d 327, 330 (1979); *In re Palodichuk*, 22 Wash. App. 107, 110, 589 P.2d 269, 271 (1978). See also *United States* v. *Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (characterizing *Brown* as involving a "mere half-hearted recitation of a sug-

(Fed. R. Crim. P. 32(d) advisory committee note (1983 amendments), quoting Borman, *The Hidden Right to Direct Appeal from a Federal Conviction*, 64 Cornell L. Rev. 319, 327 (1979)). Special standards govern such collateral attacks. By contrast, the cases upon which the court of appeals relied—*United States* v. *Grandinetti* and *United States* v. *Brown*—arose on direct appeal.

Rule 32(d), as in effect when respondent filed his motion for collateral relief, permitted a court to set aside a conviction and allow a defendant to withdraw his guilty plea only to "correct manifest injustice." [13] Under 28 U.S.C. 2255, relief may be granted on the basis of a constitutional error or other error that constituted " 'a fundamental defect which inherently results in a complete miscarriage of justice.' " *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979), quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962). See also *United States* v. *Timmreck*, 441 U.S. 780, 783-785 (1979). As explained in the advisory committee note on the 1983 amendment to Rule 32(d) (see note 13, *supra*), there is not a significant distinction between these two standards. Neither standard was met here.

Even if we assume that the court of appeals was correct in imposing the additional procedural requirement that the government explain its justification for a particular sentence, the government's failure to do so was, at most, a technical error that cannot be thought even remotely to approach "manifest in-

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gested sentence"); *United States* v. *Garcia*, 698 F.2d 31, 37 (1st Cir. 1983) (same, quoting *Bowler*).

[13] Rule 32(d) was amended in 1983 to provide that after sentence has been imposed, if the defendant does not take a direct appeal, a plea may be set aside only under 28 U.S.C. 2255.

justice" or a "fundamental defect" in the proceedings. Compare *United States* v. *Timmreck*, 441 U.S. at 783-785. The basic undertaking by the government in the plea agreement—and its only express undertaking—was to recommend probation. As Judge Wallace concluded, respondent "got what he bargained for" in that regard (App., *infra*, 7a), since the district court found in these collateral proceedings that it was "perfectly apparent" to everyone present at sentencing, including the court, that the government recommended probation (*id.* at 12a).[14]

There is no indication that the parties regarded a statement of reasons by the government as an essential element of the bargain as well or that the absence of such a statement had any bearing on the court's understanding of the government's recommendation. To the contrary, the fact that neither defense counsel nor the court requested the government to make a presentation regarding its recommendation after the error in the presentence report was called to the court's attention strongly indicates that defense counsel did not believe that there had been any breach of the plea agreement by the government after it concurred in the correction and that the court believed

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[14] In light of the express finding by the same district judge who presided at sentencing—a finding that the court of appeals did not find to be clearly erroneous (see *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982))—the court of appeals' own belief that the prosecutor's remark was "ambiguous" because it "could have been interpreted" as a statement of past intent by the government (App., *infra*, 3a) plainly does not furnish a basis for relief. The court of appeals' view that the prosecutor's remark "left an impression with the [district] court of less-than-enthusiastic support for leniency" (*ibid.*) is similarly without support. The district court made no such finding.

no further explaination by the government was necessary.[15] There thus was no basis for collateral relief.

This conclusion cannot be avoided on the premise that the prosecutor's making of a statement was an aspect of the plea bargain and that the failure of the government to make the recommendation automatically requires relief. This Court's decision in *Santobello* v. *New York*, *supra*, does not suggest that relief is required for any defect, no matter how technical or immaterial, in the implementation of the plea agreement. To the contrary, the Court observed in *Santobello* that a promise must be fulfilled "when a plea rests in any significant degree on a promise or agreement of the prosecutor" (404 U.S. at 262). Here, there is no indication that respondent's guilty plea rested at all, much less to "any significant degree," on a promise by the prosecutor to express a justification for the recommendation of probation. He did not even argue in these collateral proceedings that he was entitled to such an explanation. The Second Circuit reached a similar conclusion in *Bergman* v. *Lefkowitz*, *supra*, stating that it could not find that the plea rested "in any significant degree" on an "understanding that the prosecutor would use enthusiastic language in recommending no additional prison sentence" (569 F.2d at 716 n.18).

The court of appeals did not even address these considerations in granting relief. It therefore has invited collateral attacks on convictions resting on guilty pleas—where the societal interest in finality

[15] Moreover, even the clarification that the government actually was recommending probation, as distinguished from making no recommendation, was characterized by defense counsel at sentencing as only a "slight correction" (5/21/76 Tr. 4).

has particular force, *United States* v. *Timmreck*, 441 U.S. at 784—based not on the voluntariness of the defendant's plea, the nature of his own lawyer's advice, or the prosecutor's adherence to the essential elements of the plea bargain, but on peripheral matters concerning the extent or quality of the prosecutor's statement or advocacy in support of a recommendation. And it has invited such attacks even where, as here, that recommendation was clearly understood by the sentencing court. As a result, the decision below casts doubt on the validity of numerous guilty pleas entered into in the Ninth Circuit and creates confusion with respect to the prosecutor's duties. Review by this Court therefore is warranted.

b. The court of appeals ignored the strong societal interest in finality in another respect as well. Because respondent did not object to the prosecutor's performance under the plea agreement at the time of sentencing or on direct appeal, he committed a double procedural default and is entitled to relief on collateral attack under 28 U.S.C. 2255[16] only upon a showing of "cause" for that default and "actual prejudice" resulting from the omission. See *United States* v. *Frady*, 456 U.S. 152 (1982). However, the court of appeals did not consider whether respondent could satisfy this test.[17]

[16] Because the court of appeals vacated respondent's sentence and remanded for resentencing, but did not allow respondent to withdraw his guilty plea, the court of appeals apparently granted relief only under 28 U.S.C. 2255, not Rule 32(d).

[17] The government argued in its petition for rehearing in the court of appeals (at 9-11) that respondent had not established "cause" for his procedural default.

Respondent argued below that he was entitled to relief under 28 U.S.C. 2255 because the district court had errone-

It was especially unjustified for the court of appeals to sustain respondent's collateral attack on his conviction in the circumstances of this case. Respondent served 18 months of his six-year Youth Corrections Act sentence without objection. He thereafter was released on parole and did not file the instant motion until 1981, after he had remained at large for several years following the issuance of a parole violator warrant. It is a fair inference that respondent's efforts to obtain collateral relief were triggered by the threatened revocation of his parole, not by an actual defect in his guilty plea or the government's performance under the plea agreement. In any event, the court of appeals' imposition of novel requirements for such agreements warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1985

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ously advised him that he would waive his right of appeal if he pleaded guilty. Appellant's Br. B-10; see note 3, *supra*. If, notwithstanding his representation by counsel, respondent could establish that this statement led him not to take an appeal he otherwise would have taken, he might well have established "cause" for failing to raise the issue on direct appeal. But this would not overcome his initial procedural default in failing to raise the issue in district court.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4689

DC Nos. CV 81-4130-RHS
CR 76-225-RHS

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOSEPH BENCHIMOL, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Northern District of California
Robert H. Schnacke, District Judge, Presiding

Argued and Submitted March 12, 1984

[Filed Jul. 24, 1984]

OPINION

Before: WALLACE, HUG and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Joseph Benchimol appeals the denial of his motion brought under Fed. R. Crim. P. 32(d) and 28 U.S.C.

§ 2255 to withdraw his guilty plea of mail fraud or in the alternative to vacate his sentence and be resentenced to time served. We hold that the government's failure to state its recommendation clearly and to express the justification for the sentence it had agreed to recommend constituted a breach of its duty under the plea agreement.

FACTS

Joseph Benchimol mailed applications to obtain credit cards using false names and false information. He then purchased merchandise using the credit cards, but failed to make payments. In 1976, the United States Postal Service issued a complaint. Benchimol was charged with one count of violating 18 U.S.C. § 1341 (mail fraud). Benchimol agreed to plead guilty. The government concedes that in exchange for the guilty plea it promised to recommend probation with restitution. However, at the sentencing hearing, the presentence report incorrectly stated that the government would stand silent. Benchimol's counsel informed the court that the government instead recommended probation with restitution. The Assistant United States Attorney then stated: "That is an accurate representation."

DISCUSSION

A postsentencing motion to withdraw a guilty plea is directed to the discretion of the trial court, and may be granted only to correct manifest injustice. Fed. R. Crim. P. 32(d); *Pinedo v. United States*, 347 F.2d 142, 147 (9th Cir. 1965), *cert. denied*, 382 U.S. 976 (1966). The district court's discretion is guided by the rule announced in *Santobello v. New York*, 404 U.S. 257 (1971), that when a guilty plea "rests in

any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262.

Here, it is undisputed that the government agreed to recommend probation with restitution. If the government was not fully convinced that the recommendation was justified, it should not have entered into the plea agreement. Having done so, the government owed a duty to state its recommendation clearly to the sentencing judge and to express the justification for it. Benchimol had every right to expect this in exchange for his plea of guilty. A perfunctory statement of the recommendation can easily leave the impression that the government is unconvinced that the recommendation is appropriate or even that it tacitly disfavors the recommendation. Here the government made less than a perfunctory recommendation to the sentencing judge; it made a single remark at the sentencing hearing agreeing with Benchimol's counsel's correction of the presentence report. Even this remark was ambiguous. Benchimol's counsel's statement that the government *recommended* probation with restitution could have been interpreted as a statement of past intent of the government. Moreover, the introduction of the erroneous presentence report stating that the government would stand silent enhances the impression that the government had withdrawn from its earlier support of probation with restitution. The government made no effort to explain its reasons for agreeing to recommend a lenient sentence but rather left an impression with the court of less-than-enthusiastic support for leniency.

We hold that when the government undertakes to recommend a sentence pursuant to a plea bargain,

it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it. The government's failure to honor its promise under a plea bargain entitles a defendant to relief when he has relied on that premise. In so rulign, we adopt the position taken by the other circuits which have considered the issue.

In *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977), the government agreed to recommend a five year sentence on a probation violation charge to run concurrently with sentences recommended on other charges. At the probation revocation hearing, a new attorney represented the government. Rather than actively advocating the government's agreed position on sentencing, that attorney expressed his personal reservations about the terms of the agreement. On appeal, the court remanded for resentencing, holding that the defendant did not receive the benefit of his bargain—a forceful and intelligent recommendation for concurrent sentences. *Id.* at 727. The court explained that

> It can not be seriously contended that in entering this plea agreement, the defendant did not have every right to expect that in exchange for his guilty plea the government would *strongly* recommend the agreed to sentence. This expectation was certainly an "inducement or consideration" for the plea, and, thus, if the agreement was not fulfilled, the defendant would be entitled to relief. This is so regardless of whether the failure of the government to strongly advocate the agreement had any effect on the sentencing judge. Judge Roettger in this case articulated very persuasive reasons why he was not following the plea agreement, but the sentence must nevertheless be vacated if the agreement was not kept because the defendant offers his plea not in exchange for the actual sentence or impact on the judge, but for the prosecutor's statement in court. If these statements are not adequate (as opposed to successful), then the agreement has not been fulfilled. . . .

Id. at 726 (citations omitted).

Likewise, on similar facts, the Fourth Circuit in *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974), reversed and remanded for resentencing on the ground that the government had failed to keep its bargain. The court stated:

> We have no occasion to consider the propriety of sentence, or recommendation as to sentence, as an element of a plea bargain, but it is manifest that the consideration which induced defendant's guilty plea was not simply the prospect of a formal recitation of a possible sentence, but rather the promise that an Assistant United States Attorney would make a *recommendation* on sentencing. This could reasonably be expected to be the sound advice, expressed with some degree of advocacy, of a government officer familiar both with the defendant and with his record and cognizant of his public duty as a prosecutor for the United States.
>
> Undoubtedly the district court had this understanding of the role of an Assistant United States Attorney at sentencing when he sought the prosecutor's recommendation. Certainly he was entirely correct in inquiring into the basis of the recommendation to aid him in the exercise of his sentencing discretion. Whether the prose-

> cutor's halfheartedness in presenting the recommendation was a factor in the district court's imposing a sentence more severe than that "recommended" is a matter into which we need not inquire.

Id. at 377.

The appropriate remedy for the government's breach of a plea agreement is within the discretion of the court depending on the particular circumstances of each case. *Santobello*, 404 U.S. at 263; *United States* v. *Garcia*, 698 F.2d 31, 37 (1st Cir. 1983). We remand for resentencing, at which time the government will comply with its plea bargain by clearly stating its recommendation of probation with restitution and the reasons why it believes that sentence is appropriate. Banchimol is entitled to be resentenced before a different judge. *Santobello*, 404 U.S. at 263.

REVERSED AND REMANDED.

WALLACE, Circuit Judge, dissenting:

In recommending a sentence as part of a plea bargain, the prosecutor must effectively communicate the government's firm position to the sentencing judge. The Assistant United States Attorney did exactly that in Benchimol's case. As the district judge later stated:

> It was perfectly apparent to everybody present that the government was recommending probation and that I took that into account, as I said that I would, at the time of the entry of sentence. . . . I do remember the occasion, and on reviewing the presentence report I remembered the circumstances, and there was no doubt in my mind at that time that everyone was in perfect understanding of what the position of the United States was and of the fact that I was disregarding it in that case.

Though Benchimol got what he bargained for, the government's clear recommendation of probation to the sentencing judge, the majority would set aside the sentence. Neither law nor logic requires this strange result and I therefore dissent.

First, the majority focuses on the wording and the length, or perhaps the volume, of the government's recommendation. Following common practice the Assistant United States Attorney allowed integration into the presentence report of his consideration for the plea bargain. His recommendation of probation was unqualified; but, because of a mistake in the probation office, the presentence report did not accurately reflect his firm position. Benchimol's counsel noticed the mistake and brought it to the court's attention. Because she used the word "recommended," the majority finds the government at fault.

Second, I find the majority's reliance on *United States v. Grandinetti*, 564 F.2d 723 (5th Cir. 1977), and *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974), unpersuasive. In both cases the government failed to fulfill its obligation not because it agreed with the advocacy of defense counsel, as happened in Benchimol's case, but because the prosecutors expressed open distaste for the plea bargains. *See United States v. Grandinetti*, 564 F.2d at 725 (the government attorney said of the plea bargain "I have very serious problems with that . . . . I'm not too sure of the legality of it nor the propriety . . . ."); *United States v. Brown*, 500 F.2d at 377 (the government attorney said of the plea bargain "I do have some problems with that, anyhow, but that is the way I understand it."). In addition, although those cases contain some stray language involving a governmental responsibility to "strongly advocate" the plea bargain or to express "some degree of advocacy," the majority opinion, properly I suggest, has not adopted such a role for government prosecutors. Neither the Supreme Court nor professional standards, *see* Model Code of Professional Responsibility, EC 7-1, imposes the duty of zeal an advocate owes to his client on the prosecutor fulfilling a bargain, nor could they. The defendant is not the prosecutor's client.

In arguing for a sentence of probation with restitution, Benchimol's lawyer pointed out the mistake in the presentence report and said the government, too, "recommended there be probation with restitution in this case." The government's counsel concurred: "That is an accurate representation." He agreed with her position; he did not undercut or express distaste for the plea bargain.

I believe performance of a plea bargain requires the government to convey the promised recommendation to the sentencing judge without qualification. Although *Jones v. United States*, 423 F.2d 252, 256 (9th Cir.), *cert. denied*, 400 U.S. 839 (1970), requires both the prosecution and defense fully to disclose both the terms of a plea bargain and the circumstances under which it was reached, we imposed this requirement to insure the voluntary nature of the plea. It does not require the prosecution to express its "justification" for the bargain to the court unless asked. *Cf. United States v. Gallington*, 488 F.2d 637, 640 (8th Cir. 1973), *cert. denied*, 416 U.S. 907 (1974) (requiring that judges have the parties "set forth in detail" the reasons for reaching the plea agreement). Here, the district court found such extended inquiry unnecessary. The government performed properly. No one was misled. I would therefore affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4689

DC No. CR 76-225 RHS
Northern California

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JOSEPH BENCHIMOL, DEFENDANT-APPELLANT

[Filed Nov. 9, 1984]

ORDER

Before: WALLACE, HUG and FERGUSON, *Circuit Judges.*

A majority of the members of the panel that decided this case, Judges Hug and Ferguson, has voted to deny the petition for rehearing. Judge Wallace has voted to grant the petition for rehearing. The panel has voted unanimously to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

PAGES 3-9 OF THE TRANSCRIPT
PROCEEDINGS IN THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF CALIFORNIA ON
DECEMBER 15, 1981

[3] THE CLERK: Criminal 76-225, United States versus Joseph Benchimol, further hearing on motion to reduce sentence.

Appearances, Counsel?

MR. FELDMAN: Robert Feldman for the government. Good morning, Your Honor.

MR. BARNETT: Scott Barnett on behalf of Joseph Benchimol.

THE COURT: All right. Anything you want to add to the showing that's already been made?

MR. BARNETT: Your Honor, other than the fact that I did contact the previous public defender and would make an offer of proof that she has no independent recollection of what happened.

THE COURT: Well, the facts seem perfectly clear; don't they? At the time the plea was taken, the nature of the agreement was correctly stated. At the time of sentence, the presentence report incorrectly stated that the United States was to stand silent. Then at the hearing, defense counsel pointed out the discrepancy. The reporter, quite obviously, didn't punctuate correctly; but the gist of what is being said is perfectly consistent with what happened.

Miss Trumbull said there's one slight correction in [4] the presentence report and the probation officer may very well have pointed that out. The government recommended that there be probation with restitution in this case and then the reporter incorrectly

finished the sentence there and went on to say "Rather they would stand silent." The actual language was that the government recommended that there be probation with restitution in this case rather than that they would stand silent. I believe that's what the report reflects and Mr. Gibbons agreed with that.

It was perfectly apparent to everybody present that the government was recommending probation and that I took that into account, as I said that I would, at the time of the entry of sentence. But it was everyone's understanding including the expressed understanding by the defendant, that I wasn't to be bound by that.

So there isn't any impropriety. There is nothing more than, what is unfortunately too common, a failure of the court reporter to catch small connecting words and to make two sentences out of one because some of the little words were missed. But there isn't any other rational reading of the transcript of the sentencing proceedings that there can be in the light of what the circumstances were, and Miss Trumbull pointed out that discrepancy which there clearly was.

The one position of the government had been stated at the plea hearing, a different one was stated in the [5] presentence report and Miss Trumbull pointed out the discrepancy and given heed at that point for the United States that the true position of the United States was that they were recommending probation. In the circumstances of the case, obviously I thought probation inappropriate and I sentenced otherwise, but that was within the full understanding of all parties.

I see no basis for granting relief unless I've missed something that you want to point out to me.

MR. BARNETT: May I be heard on the matter?

THE COURT: Sure.

MR. NARNETT: Your Honor, I know that counsel for the government discussed the matter with the court reporter and that there was some, at least belief on the part of the counsel for the government, that the record had been incorrectly transcribed. The reporter reviewed his notes and has obviously concluded that what he transcribed was in his notes. Now—

THE COURT: I have no quarrel with that. That particular reporter almost of necessity had to transcribe what was in his notes because his notes went into a computer and the computer translated the notes. He customarily did so accurately. The failure is in the ability to hear, as I say, small connecting words. There was a couple words left out in there. [6] Miss Trumbull does not have a trumpeting voice and unfortunately on frequent occasion I don't. And I have found, as I think every lawyer and judge has, any number of instances where prepositions or conjunctives or qualifying words are swallowed or stated so rapidly that the reporter simply doesn't pick them up in the notes.

I have an independent recollection of this in a very vague way even though it was this far back. I do remember the occasion, and on reviewing the presentence report I remembered the circumstances, and there was no doubt in my mind at that time that everyone was in perfect understanding of what the position of the United States was and of the fact that I was disregarding it in that case.

MR. BARNETT: Your Honor, if the case does go on appeal and the court rules adversely, the Ninth Circuit is going to be bound by the record and I think that I would resist strongly any attempts by

the Government to augment the record as I would today.

I thing it's important that the court consider one of the cases that I point out that I think could give the court some guidance in this area because essentially what the court recalls about the government's position and what the government did about the position from the case law, as I understand it out of the Fourth Circuit in 1974 and later affirmed to be the law in the Ninth Circuit, that the [7] question of the effect of the District Court—the effect on the District Court of the prosecutor's noncompliance with the plea bargain in deemed irrelevant. If we—

THE COURT: I know, but totally ridiculous interpretations of the reporter's notes—

MR. BARNETT: Your Honor, that's not the only problem.

THE COURT: —is not irrelevant.

MR. BARNETT: Your Honor, that's not the only problem.

THE COURT: There is no conceivable, rational reading of Miss Trumbull's statements as it's set forth in the reporter's notes and transcript.

MR. BARNETT: Your Honor, let's assume that Mr. Gibbons and his statement that this is an accurate representation is what the government purports to mean is compliance with their agreement pretrial to recommend probation. In determining significance—I'm quoting from the case of United States versus Robert Nathaniel Brown decided July 18th, 1974, in the Fourth Circuit. The importance of this case is as follows although I won't admit that I agree with the court's interpretation of the record as I am bound by the record, as the Court of Appeals is bound by the record as to its statement, and its says the government would remain silent and that is not disregarded by the United [8] States Attorney. He says as a matter of fact that is an accurate representation. Assuming that aside, let's look at the rest of the record.

What is it that the government says in support of their pretrial agreement to recommend probation? Not one word.

In Nathaniel Brown, in that case—

THE COURT: They recommended probation.

MR. BARNETT: Your Honor, may I finish, please? They suppose—

THE COURT: You have finished, counsel, Thank you. I've considered your argument and the presentation.

MR. BARNETT: Well, our Honor, I would like to preserve a record for appeal.

THE COURT: If you have—

MR. BARNETT: Your Honor, Nathaniel Brown stands for the proposition—

THE COURT: If you have anything additional to add, add it in writing.

MR. BARNETT: Pardon me? I don't understand. Why can't I argue to the court?

THE COURT: See, that's what frequently happens. Either I or counsel make statements. They aren't completely understood. Reporters are no better than counsel and words are frequently missed. I said thank you, counsel.

[9] MR. BARNETT: I'm not talking about the word that was missed. I'm talking about the fact that on the record—

THE COURT: I'm talking about the words that you just missed. I told you that the presentation had been completed and I thank you for it.

* * * *

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(2)

No. 84-1165

In The
Supreme Court of the United States
October Term, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

JOSEPH BENCHIMOL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government breached its plea agreement with the respondent under Fed. R. Crim. P. 11(e)(1)(B) when the government had promised as a part of the plea agreement to recommend to the sentencing judge a sentence of probation and restitution by the respondent and then at sentencing merely stated "that is an accurate representation" where the record STATES the government's position as "Rather they would stand silent".

2. Whether the appropriate remedy by the Court of Appeals for this government's breach of a plea bargain was a remand for resentencing before a different judge where the trial judge expressed a vague recollection of information on May 21, 1976 where (a) none of the parties at that hearing, including the reporter, have an independent recollection of the events or testimony taken at that hearing and (b) the certified transcript of the hearing contradicts the trial judge's vague recollection.

3. Whether a Writ of Certiorari should be granted by this Court in this case which (a) does not involve a question of public importance, (b) represents no "real or embarrassing conflict of opinion and authority between the Circuit Courts of Appeal", involves no "special and important reasons for review", and lastly (d) involves a statute which has been repealed by new law.

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STATEMENT OF THE CASE

On March 12, 1976, a Complaint was filed in the District Court charging the respondent with one count of Mail Fraud, in violation of 18 U.S.C. Section 1341. The government as an inducement to the entry of a plea of guilty promised to recommend probation and a particular sum of restitution (E.R. 24, Exhibit; E.R. 6, page 2, item 11).[1] Pursuant to the bargain, respondent entered a plea of guilty on April 30, 1976 (4/30/76 Tr. 4,6).[2]

In entering his plea respondent relied on the statements of the Court that by entering the plea he would waive his right to appeal (4/30/76 Tr. 4, lines 20-25, and 5, lines 1-13).[3]

At the hearing for sentencing, the government did not specifically state its agreed recommendation. Instead, after respondent's counsel mentioned a "slight correction in the presentence report" to the effect that the government would stand silent, the prosecutor stated merely, "That is an accurate representation." The presentence report did not contain any recommendation of probation with restitution.[4] The sentencing judge then sentenced the respondent to be committed under the Youth Corrections Act, Title 18 U.S.C. Sections 5001 et seq., then in effect, for a maximum six years' custody (5/21/76 Tr. 10).

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[1]"E.R." refers to the Excerpts of Clerk's Record filed in the Court of Appeals.

[2]"Tr." refers to the Reporter's Transcript of the proceeding for the date shown.

[3]The statements made in Court in this respect are reproduced in Appendix A, infra.

[4]The statements made in Court in this respect are reproduced in Appendix B, infra.

Respondent subsequently filed a motion under Fed. R. Crim, P. 32(d) and 28 U.S.C. 2255 to withdraw his guilty plea or, in the alternative, for postconviction relief (ER 8). By the motion respondent contended that the government had "Failed to meet its promise pursuant to the terms of the Plea Bargain" and that the government "stood silent without recommending probation" (ER 9); that he had been deprived of his right to appeal by relying on the Court's statement that he waived the same (ER 11), demonstrating a basis for relief under 28 U.S.C. Section 2255 (ER 11); that his guilty plea was not knowing and voluntary; and that he had thus been subjected to manifest injustice within Fed. R. Crim. P. 32(d) and its progeny (ER 13).

At the hearing on respondent's motion on December 15, 1981, the Judge in effect testified against the record, in that he rewrote the transcript of the hearing premised upon a "very vague" recollection retained some five and one-half years after the original hearing, making assumptions as to allegedly missing words and phrases in the record. As a result he in effect found the recommendation that was absent from the record. He stated that "Either I or counsel make statements. They aren't completely understood. Reporters are no better than counsel. . . ." (12/15/81 Tr. 8).[5] The motion was denied.

The respondent appealed from the order denying his motion to the Ninth Circuit Court of Appeals. He contended that the district judge had in effect testified against the record in the motion hearing, and erred in

[5]The statements made in Court in this respect are reproduced in Appendix C, infra.

not referring the hearing to another judge. He further contended that because of a breach of a plea agreement being a violation of due process and manifest injustice within Fed. R. Crim. P. 32(d), the trial court had erred in denying his motion. He further contended the trial court had effectively misled him regarding his right to appeal, with the result that his sentence had been imposed in violation of the Constitution, within 28 U.S.C. 2255.

The respondent's Opening Brief was filed in the Ninth Circuit Court of Appeals on June 21, 1982. The appellee government filed its brief about one and one-half years later, on or about February 3, 1984; only after being admonished that unless the brief was filed, the government would be precluded from filing same.[6]

The Ninth Circuit Court of Appeals reversed and remanded the case for resentencing, 738 F.2d 1001 (1984), stating, 738 F.2d at 1001:

> . . . Here the government made less than a perfunctory recommendation to the sentencing judge; it made a single remark at the sentencing hearing agreeing with Benchimol's counsel's correction of the presentence report. Even this remark was ambiguous. Benchimol's Counsel's statement that the agreement *recommended* probation with restitution could have been interpreted as a statement of past intent of the gov-

[6]The language of the Order of the Court of Appeals in this respect appears as Appendix D, infra. It should be noted that the government was reprimanded for failing to follow the briefing schedule set by the Ninth Circuit and precluded from giving oral argument. Query-How concerned was the government about the issues of the case? The respondent submits they obviously were not that interested.

ernment. Moreover, the introduction of the erroneous presentence report stating that the government would stand silent enhances the impression that the government had withdrawn from its earlier support of probation with restitution. . . .

———o———

ARGUMENT FOR DENIAL OF THE PETITION

The respondent herein will address the questions presented in the order of their importance.

First, the respondent addresses the question whether a review on writ of certiorari is appropriate in this case.

The laws governing sentencing, probation, youthful offenders, and the methods to be employed by Federal trial Courts in scrutinizing plea agreements under Fed. R. Crim. P. 11(e) have presently been revised and reformed under a wholly new statutory scheme by the enactment of the Comprehensive Crime Control Act of 1984, Title II, Pub. L. No. 98-473, 98 Stat. 1976 et seq. The Youth Corrections Act, 18 U.S.C., Part IV, Chapter 402, Sections 5001 et seq., under which the respondent herein was sentenced, was repealed.[7] The former law which contained specialized sentencing statutes applicable to narrow classes of offenders including class of individuals between the ages of 18 and 22 (of which the respondent herein was a member), and involved sentences made indeterminate by a parole release program. The Comprehensive Crime Control Act of 1984 introduces a "sentencing guidelines system" that is intended to treat all classes of offenses com-

[7]Pub. L. No. 98-473 Section 218(g), U.S. CODE CONG. & AD. NEWS (98 Stat.) 2027.

mitted by all categories of offenders consistently, within detailed criteria set forth in new sentencing guidelines supplemented by policy statements.[8] Certain considerations within the guidelines, and a statement of reasons on the record for imposing a sentence, are made obligatory on the sentencing Judge. P. L. No. 98-473 Section 3553, 98 Stat. 1990. With reference to the acceptance or rejection of plea agreements entered into between the defense and prosecution, 28 U.S.C. Section 994, as added 98 Stat. 2019, now provides, in pertinent part:

> (a) The [United States Sentencing] Commission. . . . shall promulgate and distribute to all Courts of the United States Probation System—
>
> . . . (2) general policy statements regarding application of the guidelines or any other aspect of sentencing . . . including the appropriate use of—
>
> . . . (D) the authority granted under rule 11(e) (2) of the Federal Rules of Criminal Procedure to accept or reject a plea agreement entered into pursuant to rule 11(e) (1); . . .

Pertinent commentary regarding 28 U.S.C. Section 994(a) (2) (D) in S. Rep. No. 98-225, 98th Cong., 63, as reprinted in U.S. CODE CONG. & AD. NEWS No. 9A, at 66, is as follows:

> . . . Under . . . 28 U.S.C. 994(a) (2) (D), the Sentencing Commission is directed to issue policy statements for consideration by Federal Judges in deciding whether to accept a plea agreement. This guidance will assure that judges can examine plea agreements. . . . Professor Stephen J. Schulhofer, who initially raised the question of whether sentencing guidelines

[8]See S. Rep. No. 98-225, 98th Cong., 40, 41, reprinted in 1984 U.S. CODE CONG. & AD. NEWS No. 9A, at 43, 54.

would shift too much discretion to prosecutors, has stated that judicial review of plea bargaining under such policy statements should alleviate any potential problem in this area.

Congress has thus introduced a newly weighed and considered statutory scheme, constituted by new underlying theories and objectives for sentencing. S. Rep. 98-225 indicates that Congress has entered the field of "judicial review of plea bargaining", which "will assure that judges can examine plea agreements." Issues surrounding firm and effective communication of the prosecutor's recommendations, and the sentencing judge's receipt and scrutiny of the recommendations, thus come into a new and different substantive and procedural setting.

Consequently this case presents a poor vehicle for adjudication of any issue of present interest to the public. Due to the unusual facts and archaic subject matter involved, the effects of a Supreme Court pronouncement on this case would be confined to the case itself or to a small and diminishing class of formerly-sentenced persons. The effects of such a pronouncement could be, on the other hand, divisive, confusing and would have little value in prospective application to sentencing, as the pronouncement would occur without any relevance to the new, existing law and its rationales. Any principle of importance to the public would be better addressed to the context of a case arising under the Comprehensive Crime Control Act of 1984 and the guidelines and policy statements mandated in that Act.

A review on writ of certiorari will be granted only when there are special and important reasons therefor. U.S. Sup. Ct. Rule 17.

In *Rice v. Sioux City Cemetery,* 349 U.S. 70 (1955), following the granting of a petition for a writ of certiorari, a statute, enacted subsequent to the commencement of the case and which would govern future cases of that type, was called to the attention of the United States Supreme Court. The Court, in reconsideration of whether there existed "special and important reasons" for granting review, vacated its order granting the writ, and in dismissing the petition for the writ as improvidently granted, stated, 349 U.S. at 74:

> . . . A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. . . .

And at 349 U.S. at 76-77:

> Had the statute been properly brought to our attention . . . the case would have assumed such an isolated significance that it would hardly have been brought here in the first instance. . . .
>
> Moreover, the evident difficulties of the case suggest that, in the absence of compelling reason, we should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute.

The argument that the new law in its prospective application, would bypass and deny a remedy to the petitioner, was raised unsuccessfully in the dissenting opinion. 349 U.S. at 80.

Under the circumstance of a controversy laid arising under a subsequently repealed statute, this Court has stated that "the question is therefore not of public im-

portance." *District of Columbia v. Sweeney,* 310 U.S. 631 (1940).

Certiorari is granted in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. *NLRB v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502 (1951).

The fact that the petitioner's Brief on the appeal was filed and served approximately one and one-half years after the filing by the respondent of the Opening Brief demonstrates the lack of interest shown by the government, the lapse of time making any issues of public interest obsolete, and a lack of special and important reasons for review on writ of certiorari.

With respect to the question whether the government breached its plea agreement, sufficient law already exists to dispose of the instant case, with no substantial intercircuit conflict. The Court of Appeals below, *United States v. Benchimol,* 738 F.2d 1001, at 1001-1003, noted that it was "adopt[ing] the position taken by other circuits which had considered the issue", and cited *United States v. Grandinetti,* 564 F.2d 723 (5th Cir. 1977) and *United States v. Brown,* 500 F.2d 375 (4th Cir. 1974). Circuit Judge Wallace in dissent acknowledged the general rule that "In recommending a sentence as a part of a plea bargain, the prosecutor must effectively communicate the government's firm position to the sentencing judge" (738 F.2d at 1003). Yet he attempted to distinguish the instant case from *United States v. Grandinetti,* supra, and *United States v. Brown,* supra, on the basis that in *Grandinetti* and *Brown,* per Judge Wallace, " . . . the prosecutors expressed open distaste for the plea bargains." 738 F.2d at 1004.

The law imposes a requirement of effective communication of a firm position. "Open distaste" is but one of many ways in which a prosecutor may fall short of this requirement. The Court of Appeals in the instant case found that the prosecutor while not expressing open distaste for the plea agreement, had not effectively communicated a firm position of the government, and so the Court reached a result which was consistent with these principles. There was a breach of the plea agreement within existing law. There is no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" (*NLRB v. Pittsburgh S.S. Co.,* supra, 340 U.S. at 502) as would encourage review on writ of certiorari.

With respect to the proper remedy for a breach of a plea agreement, this Court in *Santobello v. New York,* 404 U.S. 257 (1951), listed possible remedies as specific performance of the agreement or vacation of the plea, the choice to be a discretionary measure, guided by the circumstances of the case, such that the promise be fulfilled. 404 U.S. at 262-263. Resentencing, as directed by the Court of Appeals in this case, is well within that rule of discretion.

CONCLUSION

1. The government breached its plea agreement with the respondent under Fed. R. Crim. P. 11(e) (1) (B) when the government had promised as a part of the plea agreement to recommend to the sentencing judge a sentence of probation and restitution by the respondent and then at sentencing merely stated "that is an accurate representation", where the record stated the government's position as "Rather they would stand silent".

2. A remand by the Court of Appeals with directions to resentence the respondent was an appropriate remedy for the government's breach of the plea agreement.

3. A review of this case on writ of certiorari as urged by the petitioner presents at best a risk of inconclusive and divisive disposition. This case does not afford an appropriate instance for review of the questions presented. Given that this is a case of isolated significance by virtue of its unusual and limited facts and that there now exists a new body of statutes governing sentencing to which a decision on this case would have no relevance, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 1985

APPENDIX A

PAGE 4, LINE 21, THROUGH PAGE 5, LINE 13, OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON APRIL 3, 1976

[4] Q. [BY THE COURT:] All right. You know you are entitled to a jury trial; that twelve jurors would have to find you guilty before you could be determined to be guilty; that you'd have the power to compel the production of witnesses and evidence on your own behalf, to see and hear the witnesses against you; [5] to either take the witness stand yourself or refuse to take the witness stand if you chose to, and if you did not take the witness stand no adverse inference could be drawn against you? In addition, you'd have the right to appeal if you were found guilty?

You waive all of those rights if you enter a guilty plea. Have you discussed all of this with Ms. Trumbell?

A. [BY JOSEPH BENCHIMOL:] Yes, I have.

Q. And you are aware of what your rights are?

A. Yes.

Q. And you are prepared to waive all of them by entering a guilty plea; correct?

A. Yes, Your Honor.

APPENDIX B

PAGE 4 OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON MAY 21, 1976

[4] THE CLERK: Criminal case 76-225; United States versus Joseph Benchimol.

Counsel, State your appearances, please.

MR. GIBBONS: John Gibbons on behalf of the United States.

MS. TRUMBELL: Patricia Trumbell for Mr. Benchimol, who is present in court.

THE COURT: Judgment of guilty will be entered to the plea of guilty to the information in this matter.

Anything you want to say in mitigation of punishment, Ms. Trumbell?

MS. TRUMBELL: Yes, Your Honor. I have read and worked very closely with Mr. Cheveria in this case, and I believe Mr. Cheveria has represented that to you.

There is one slight correction in the presentence report and he may very well have pointed that out. The government recommended there be probation with restitution in this case. Rather they would stand silent, and I believe that's what the report reflects.

MR. GIBBONS: That is an accurate representation.

APPENDIX C

PAGE 5, LINE 19, THROUGH PAGE 6, LINE 13, OF THE TRANSCRIPT

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA ON DECEMBER 15, 1981

[5] THE COURT: . . . That particular reporter almost of necessity had to transcribe what was in his notes because his notes went into a computer and the computer translated the notes. He customarily did so accurately. The failure is in the ability to hear, as I say, small connecting words. There were a couple words left out in there.

[6] Miss Trumbull does not have a trumpeting voice and unfortunately on frequent occasion I don't. And I have found, as I think every lawyer and judge had, any number of instances where prepositions or conjunctives or qualifying words are swallowed or stated so rapidly that the reporter simply doesn't pick them up in the notes.

I have an independent recollection of this in a very vague way even though it was this far back. I do remember the occasion, and on reviewing the presentence report I remembered the circumstances, and there was no doubt in my mind at that time that everyone was in perfect understanding of what the position of the United States was and of the fact that I was disregarding it in that case.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4689

DC No. CR 76-225 RHS
Northern California

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

JOSEPH BENCHIMOL, DEFENDANT-APPELLANT

[Filed Mar. 27, 1984]

Before: WALLACE, HUG and FERGUSON,
Circuit Judges.

Because of the government's failure to file an answering brief, on December 19, 1983, Benchimol moved for an order reversing his judgment of conviction or, in the alternative, for an order precluding the government from filing a brief and presenting oral argument and sanctions. It ppears that Benchimol filed his opening brief June 21, 1982, and served the government. The government does not deny receipt of the brief. The government's brief was due thirty (30) days later. The government was silent for nine months. On March 25, 1983, the clerk of this court

sent the government a notice stating it had fourteen (14) days to lodge a brief and bring a motion for relief from default. The government admits it received this notice. The government did not respond. Finally, a representative of this court inquired of the government by telephone on February 14, 1984, whether the government intended to respond. [Appendix "D" draft pg. 1 of 2] [2]A brief was lodged and a motion for late filing was filed February 24, 1984.

We co clude that the attempted explanation by the Assistant United States Attorney is inadequate. The United States Attorney is admonished due to the failure to adhere to an agreed time schedule and due to the failure to respond to a notice from this court.

As we deem this public reprimand is sufficient, the brief of the government lodged February 24, 1984, is ordered filed. No sanctions will be imposed. These grounds are not sufficient for reversal. The government is precluded from oral argument.

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(3)

Office - Supreme Court, U.S.
FILED
APR 5 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1165

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BENCHIMOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1165

UNITED STATES OF AMERICA, PETITIONER

v.

JOSEPH BENCHIMOL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

Respondent virtually ignores the questions presented in this case: (1) whether, as the court of appeals held, the attorney for the government must explain the government's reasons or justifications for a sentencing recommendation made pursuant to a plea agreement, and (2) whether the omission of such an explanation by the prosecutor furnishes a basis for a collateral attack on the conviction and sentence under Fed. R. Civ. P. 32(d) and 28 U.S.C. 2255, even where, as here, the district court at sentencing clearly understood the substance of the government's recommendation and the defendant made no objection to the government's performance at the time of sentencing or by taking a direct appeal.

1. As we explain in the petition (at 10-17), the new rule announced by the court of appeals finds no support in the Constitution, Fed. R. Crim. P. 11, the logic of the plea

bargaining process, or the decisions of this Court, and that rule may prove detrimental to defendants and deter prosecutors from entering into plea agreements. The decision below also conflicts with decisions of other courts of appeals (see Pet. 17-19) and ignores established limitations on the granting of collateral relief (see Pet. 19-24).

Petitioner makes no substantial effort to dispute these arguments in favor of granting the petition. Indeed, petitioner acknowledges (Pet. 8-9) that in *United States* v. *Grandinetti,* 564 F.2d 723 (5th Cir. 1977), and *United States* v. *Brown,* 500 F.2d 375 (4th Cir. 1974), upon which the court below relied (Pet. App. 4a-6a), the " 'prosecutor expressed open distaste for the plea bargains' " (Pet. 9, quoting Pet. App. 8a (Wallace, J., dissenting)), while in this case the prosecutor did not do so. Respondent argues (Pet. 9), however, that an expression of "open distaste" should be regarded as only one means by which a prosecutor may fall short of his duty to communicate to the court the government's recommendation regarding sentencing, and that this case therefore falls in the same category as *Grandinetti* and *Brown.* This contention is without merit. As we have explained (Pet. 17-19), the First and Second Circuits have explicitly held that the rationale of *Grandinetti* and *Brown* applies only where the prosecutor has "effectively undercut" the plea bargain. Those courts therefore have denied relief where, as here, the prosecutor's recommendation was communicated to the court in a manner that did not undercut the plea bargain, and the defendant's claim was simply that the prosecutor should have been a more forceful advocate in support of the plea agreement. *United States* v. *Tursi,* 576 F.2d 396, 399 (1st Cir. 1978); *Bergman* v. *Lefkowitz,* 569 F.2d 705, 714-716

(2d Cir. 1977). The Ninth Circuit's decision in this case conflicts with these decisions of the First and Second Circuits and thus warrants review.[1]

2. Instead of addressing the questions presented, respondent devotes most of his brief in opposition to a different matter: Congress's enactment of the Comprehensive Crime Control Act of 1984 (1984 Act), Tit. II, Pub. L. No. 98-473, 98 Stat. 1976 *et seq.* See Br. in Opp. 4-8. Respondent first seems to suggest (Br. in Opp. 4, 6) that the decision below is not of continuing importance because the Youth Corrections Act (18 U.S.C. 5001), under which he was sentenced, was repealed by Section 218(g) of the Comprehensive Crime Control Act 1984, 98 Stat. 2027.[2] This suggestion is frivolous. The decision of the court of appeals does not turn on the particular statute under which respondent was sentenced; the opinion does not even mention the Youth

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[1]Other courts also have declined to follow *Grandinetti* and *Brown* in circumstances such as those presented here. See Pet. 19 nn. 11 & 12. In addition, *Grandinetti* and *Brown,* unlike the instant case, arose on direct appeal, not collateral attack. Respondent does not even mention this critical distinction, much less answer our submission (Pet. 19-24) that he has not (i) established "manifest injustice" to warrant relief under former Fed. R. Crim. P. 32(d), or (ii) satisfied the "cause and prejudice" standard to overcome his procedural default in failing to raise the issue at sentencing or on direct appeal and establish a "fundamental defect" in the proceedings warranting relief under 28 U.S.C. 2255. See *United States* v. *Frady,* 456 U.S. 152 (1982); *United States* v. *Timmreck,* 441 U.S. 780, 783-785 (1979).

[2]The Act establishes a new sentencing system, based on sentencing guidelines (see pages 4-5, *infra*), that "is intended to treat all classes of offenses committed by all categories of offenders consistently" and to "eliminate [the need for] specialized sentencing statutes that cover narrow classes of offenders," such as the Youth Corrections Act. S. Rep. 98-225, 98th Cong., 1st Sess. 51 (1983). Congress determined that the provision in 28 U.S.C. 994(d), as added by Section 217(a) of the 1984 Act, 98 Stat. 2020, that the Sentencing Commission's guidelines must take into account the age and criminal history of the offender "is sufficient to assure such specialized treatment as is desirable for th[e] category of [youth] offenders." S. Rep. 98-225, *supra,* at 120.

Corrections Act or the fact that respondent was sentenced under it. Rather, the courts of appeals' holding applies broadly to *any* plea agreement under which the attorney for the government is to recommend a particular sentence, irrespective of the source of the court's sentencing authority.

Also without merit is respondent's alternative contention (Br. in Opp. 5-6) that the Court should deny certiorari because of the provision for the issuance in the future of certain policy statements pertaining to sentencing under the Comprehensive Crime Control Act of 1984. Section 217(a) of the 1984 Act establishes a United States Sentencing Commission, which will promulgate guidelines concerning sentences to be imposed for given categories of offenses committed by given categories of offenders. 28 U.S.C. 994(b)-(d), as added by § 217(a) of the 1984 Act, 98 Stat. 2019-2020. See S. Rep. 98-225, 98th Cong., 1st Sess. 51 (1983). The Act also provides for the Commission to promulgate general policy statements regarding the application of the sentencing guidelines in other contexts, including, inter alia, in connection with a district court's authority under Fed. R. Crim. P. 11(e)(2) to accept or reject a plea agreement entered into pursuant to Fed. R. Crim. P. 11(e)(1). See 28 U.S.C. 994(a)(2)(D), as added by § 217(a) of the 1984 Act, 98 Stat. 2019. This provision was enacted in response to fears that prosecutors might use the plea bargaining process to circumvent the sentencing range provided for in the Commission's guidelines — *e.g.*, by agreeing to reduce the charges in exchange for a guilty plea — and might thereby impede realization of the benefits otherwise to be expected from a system of guidelines that provide similar sentences for similar conduct. Under the new 28 U.S.C. 994(a)(2)(D), the Sentencing Commission is required to issue policy statements to be used by sentencing courts in determining whether to accept a charge-reduction plea agreement in order to assure against undue leniency and sentencing disparity. See S. Rep. 98-225, *supra*, at 63, 167.

It is possible that in some circumstances the contemplated policy statements would result in questioning of defense counsel and the prosecutor by the district court in the case of a plea agreement that provided for the reduction of charges in exchange for a guilty plea, although even then it is unclear to what extent the court would actually require a statement by the prosecutor of the government's justification for a particular recommendation. Nor is it clear that the contemplated policy statements will even address the acceptance of a plea agreement, such as that involved in this case (Pet. App. 2a), that simply provides for the prosecutor to recommend a particular sentence but does *not* provide for a reduction of the charges. In addition, the Act contemplates that the guidelines will provide a range of permissible sentences. 28 U.S.C. 994(b), as added by § 217(a), 98 Stat. 2019-2020. The prosecutor's recommendation, pursuant to a plea agreement, of a particular sentence within that range thus will continue to be of importance, and the court of appeals' holding would apply to such recommendations. It also is possible that the guidelines themselves could provide for a reduced sentence where the defendant has pleaded guilty. The prosecutor's recommendation regarding sentence would be significant in that event as well.

In any event, the 1984 Act does not require that the initial set of sentencing guidelines be issued until April 1986, and those guidelines cannot go into effect for at least six months thereafter. § 235(a)(1), 98 Stat. 2031-2032. Further, there is no fixed deadline for issuance of whatever policy statements the Commission may formulate regarding the application of those guidelines. Respondent's assertion that the court of appeals' decision will be affected by policy statements to be issued at some point in the future by a Commission that has not yet even come into being therefore is wholly speculative.

By contrast, the issue presented in this case are of substantial *immediate* importance, because the decision below opens a whole new avenue of collateral attack on guilty pleas throughout the Ninth Circuit on grounds that have nothing to do with the voluntariness of the guilty plea or the prosecutor's adherence to the essential elements of the plea agreement, but instead relate to the peripheral matter of the quality of the prosecutor's advocacy. Moreover, the court of appeals' holding that the defendant is entitled to have the prosecutor give a statement of the government's justification for a sentencing recommendation made pursuant to a plea bargain would not appear to be limited to federal prosecutions. It therefore calls into question the finality of state convictions based on guilty pleas entered pursuant to such bargains and the duties of state prosecutors in future cases. Plea agreements in state courts of course would not be affected in any way by whatever policy statements may be issued by the Sentencing Commission pursuant to the Comprehensive Crime Control Act of 1984.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

APRIL 1985

DOJ-1985-04

(4)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JOSEPH BENCHIMOL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1165. Decided May 13, 1985

PER CURIAM.

In April 1976, respondent pleaded guilty in the United States District Court for the Northern District of California to an information charging him with one count of mail fraud in violation of 18 U. S. C. § 1341. Respondent pleaded pursuant to a plea bargain whereby the Government agreed to recommend probation on condition that restitution be made. The District Court disregarded the recommendation and sentenced respondent to six years of treatment and supervision under the Youth Corrections Act, 18 U. S. C. § 5010(b). He was released on parole after serving 18 months of his sentence, but a warrant for his arrest because of parole violation was issued in 1978, and he was eventually taken into custody on that warrant in October 1981. A few days before his arrest on this warrant, he filed a motion under Federal Rule of Criminal Procedure 32(d) and 28 U. S. § 2255 to withdraw his guilty plea or, in the alternative, to have his sentence vacated and be resentenced to the time already served. He claimed that the Government had failed to comply with its part of the plea bargain upon which his guilty plea was based.

The District Court that had received the guilty plea also heard respondent's application for collateral relief, and denied it. The Court of Appeals by a divided vote reversed that judgment, holding that: "[W]hen the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its recommendation clearly to the sentencing judge and to express the justification for it." 738 F. 2d 1001, 1002 (CA9 1984). There is some slight disagreement about the facts surrounding the terms of the plea bar-

gain and its presentation to the District Court, a situation entirely understandable by reason of the lapse of more than five years between the entry of the guilty plea and the hearing on the request for collateral relief. The Court of Appeals had this view of the facts:

> "Benchimol agreed to plead guilty. The government concedes that in exchange for the guilty plea it promised to recommend probation with restitution. However, at the sentencing hearing, the presentence report incorrectly stated that the government would stand silent. Benchimol's counsel informed the court that the government instead recommended probation with restitution. The Assistant United States Attorney then stated: 'That is an accurate representation.'" *Ibid.*

The Court of Appeals concluded that the Government had breached its plea bargain because, although the Assistant United States Attorney concurred with defense counsel's statement that the Government recommended probation with restitution, it "made no effort to explain its reasons for agreeing to recommend a lenient sentence but rather left an impression with the court of less-than-enthusiastic support for leniency." *Ibid.*

We think this holding misconceives the effect of the relevant rules and of the applicable case law. Federal Rule of Criminal Procedure 11(e) provides an elaborate formula for the negotiation of plea bargains, which allows the attorney for the Government to agree to move for dismissal of other charges and to agree that a specific sentence is the appropriate disposition of the case. It also authorizes the Government attorney to make a recommendation for a particular sentence, or agree not to oppose the defendant's request for such a sentence, with the understanding that such recommendation or request shall not be binding upon the court.

It may well be that the Government in a particular case might commit itself to "enthusiastically" make a particular

recommendation to the Court, and it may be that the Government in a particular case might agree to explain to the Court the reasons for the Government's making a particular recommendation. But respondent does not contend, nor did the Court of Appeals find, that the Government had in fact undertaken to do either of these things here. The Court of Appeals simply held that as a matter of law such an undertaking was to be implied from the Government's agreement to recommend a particular sentence. But our view of Rule 11(e) is that it speaks in terms of what the parties in fact agree to, and does not suggest that such implied-in-law terms as were read into this agreement by the Court of Appeals have any place under the Rule.

The Court of Appeals relied on cases such as *United States* v. *Grandinetti*, 564 F. 2d 723 (CA5 1977), and *United States* v. *Brown*, 500 F. 2d 375 (CA4 1974), for the conclusion it reached with respect to the requirement of "enthusiasm," but it appears to us that in each of these cases the Government attorney appearing personally in court at the time of the plea bargain expressed personal reservations about the agreement to which the Government had committed itself. This is quite a different proposition than an appellate determination from a transcript of the record made many years earlier that the Government attorney had "left an impression with the court of less-than-enthusiastic support for leniency." When the Government agrees pursuant to Rule 11(e) to make a recommendation with respect to sentence, it must carry out its part of the bargain by making the promised recommendation; but even if Rule 11(e) allows bargaining about degrees of enthusiasm, there appears to have been none here.

Rule 11(e) may well contemplate agreement by the Government in a particular case to state to the court its reasons for making the recommendation which it agrees to make. The Government suggests that spreading on the record its reasons for agreement to a plea bargain in a particular case—

for example, that it did not wish to devote scarce resources to a trial of this particular defendant, or that it wished to avoid calling the victim as a witness—would frequently harm, rather than help, the defendant's quest for leniency. These may well be reasons why the defendant would not wish to exact such a commitment from the Government, but for purposes of this case it is enough that no such agreement was made in fact. Since Rule 11(e) speaks generally of the plea bargains that the parties make, it was error for the Court of Appeals to imply as a matter of law a term which the parties themselves did not agree upon.

For these reasons, we conclude that there was simply no default on the part of the Government in this case, to say nothing of a default remediable on collateral attack under 28 U. S. C. § 2255 or under Federal Rule of Criminal Procedure 32(d), as in effect before August 1, 1983. See *Hill* v. *United States*, 368 U. S. 424, 428 (1962). The petition for certiorari is accordingly granted, and the judgment of the Court of Appeals is

*Reversed.**

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*Our summary reversals are not as one-sided as the dissent claims. See *per curiam* reversals in *Smith* v. *Illinois*, —— U. S. —— (1984); *Thompson* v. *Louisiana*, —— U. S. —— (1984); *Payne* v. *Virginia*, —— U. S. —— (1984).

(5)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JOSEPH BENCHIMOL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1165. Decided May 13, 1985

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

The Court today continues its unsettling practice of summarily reversing decisions rendered in favor of criminal defendants, based not on broad principle but on idiosyncratic facts and without full briefing or oral argument. See, *e. g.*, *United States* v. *Gagnon*, —— U. S. ——, —— (1985) (BRENNAN, J., dissenting); *Florida* v. *Meyers*, —— U. S. ——, —— (1984) (STEVENS, J., dissenting); *Wyrick* v. *Fields*, 459 U. S. 42, 50 (1982) (MARSHALL, J., dissenting). Because I find this one-sided practice of summary error correction* inappropriate, I would vote merely to deny this petition for certiorari. Accordingly, I respectfully dissent.

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*There have been summary reversals in 27 noncapital cases involving criminal convictions over the last four Terms. Twenty-four of these favored the warden or the prosecutor. See *ante*, at 4; *United States* v. *Gagnon*, —— U. S. —— (1985) *(per curiam)*; *United States* v. *Woodward* —— U. S. —— (1984) *(per curiam)*; *Florida* v. *Rodriguez* —— U. S. —— (1984) *(per curiam)*; *Massachusetts* v. *Upton*, —— U. S. —— (1984) *(per curiam)*; *Florida* v. *Meyers*, —— U. S. ——, ——, and n. 3 (1984) *(per curiam)* (STEVENS, J., dissenting) (collecting cases).

(b)

SUPREME COURT OF THE UNITED STATES

UNITED STATES *v.* JOSEPH BENCHIMOL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 84–1165. Decided May 13, 1985

JUSTICE STEVENS, concurring in the judgment.

Whether or not the Government complied with Federal Rule of Criminal Procedure 11(e), I agree that the error, if any, was not serious enough to support a collateral attack under Fed. Rule Crim. Proc. 32(d) or 28 U. S. C. § 2255. The error here is "not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U. S. 424, 428 (1962). Nor has it resulted in "manifest injustice." Fed. Rule Crim. Proc. 32(d). If the Government erred in failing to recommend affirmatively the proper sentence, the time to object was at the sentencing hearing or on direct appeal. "[T]here is no basis here for allowing collateral attack 'to do service for an appeal.'" *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979) (quoting *Sunal* v. *Large*, 332 U. S. 174, 178 (1947)).

Accordingly, I concur in the judgment.